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No. 09-301

# In The Supreme Court of the United States

COMMON CAUSE OF PENNSYLVANIA; THE LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; REPRESENTATIVE GREGORY VITALI; TIM POTTS; CARL H. SILVERMAN; WILLIAM R. KOCH; AND H. WILLIAM MCINTYRE,

*Petitioners,*

v.

COMMONWEALTH OF PENNSYLVANIA; ET AL.,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## PETITIONERS' REPLY BRIEF

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## ARGUMENT

This case raises important federal questions involving serious constitutional violations by state officials, redressable only in federal court and meriting this Court's review. The opinion below and the Petition for Certiorari focus exclusively on standing, but Respondents advance a multiplicity of diversionary arguments. Ultimately, however, Respondents explicitly concede that Petitioners raise individual-rights claims, not "generalized grievances." That Respondents cannot agree amongst themselves or with the courts below as to why such valid individual-rights claims nonetheless represent "generalized grievances" underscores the doctrine's incomprehensibility, resulting in confused and, as in this case, incorrect decisions in the lower courts, requiring this Court's clarification.

Petitioners' claims under the Equal Protection, Petition, and Due Process Clauses are themselves both important and substantial. Their proper resolution, while not necessary to establish that standing was improperly denied below, further substantiates that this case involves redressable, individual injuries.

Respondents' grab-bag of additional justiciability arguments is meritless.

### I. RESPONDENTS' "GENERALIZED GRIEVANCE" ARGUMENTS ACTUALLY ALLEGE THAT PETITIONERS FAIL TO STATE A CLAIM.

Respondents pay scant attention to the standing issue in order to launch a broader justiciability assault

on Petitioners' Complaint. Even their short discussions of the "generalized grievance" concept, however, differ from both lower courts' formulations as well as each other's, highlighting the imprecision and misunderstanding that plague the jurisprudence, and the need for clarification by this Court. *See* Petition for Certiorari 19-26.

"Generalized grievance" is *sometimes* used to mean an injury too widely shared (essentially the Court of Appeals' position), *other* times to mean no cognizable injury at all but a free-floating discontent – merely, as House Respondents argue here, "disagree[ing] with...policy decisions," House Respondents' Brief at 2, asserting "some unspecified right to be involved in the legislative process," *id.* at 4, and expressing "displeasure about how a state runs its own government," *id.* at 8.

These characterizations are belied, however, by the remainder of Respondents' briefs, attacking at length Petitioners' claims *under the First and Fourteenth Amendments*. As discussed by Respondents as well as Petitioners, those claims assert not merely a general complaint that Pennsylvania state government is bad, but rather that specific conduct by state officials – possible case-fixing and an exclusionary, secretive enactment process – violated specific constitutional provisions creating individual rights inuring to *these* individual Petitioners as voters, petitioners, and litigants.

The Senate Respondents concede this point explicitly, asserting that Petitioners' claims "(mis)fram[e] their challenge...in terms of individual...rights," Senate Respondents' Brief at 11.

In short, Respondents ultimately recognize that Petitioners raise individual-rights claims, not "generalized grievances," and argue, rather, that Petitioners *are substantively wrong* on their First and Fourteenth Amendment theories. That, of course, argues not that Petitioners lack standing, but that they fail to state a claim.

## II. PETITIONERS STATE VALID FEDERAL CLAIMS.

Since Petitioners clearly possess standing to assert First and Fourteenth Amendment individual-rights claims, Respondents pivot to – and distort – the substance of those claims, which were not addressed below. While Petitioners need not prove the merits of their claims in order to establish standing, Petitioners nonetheless address here Respondents' mischaracterization of those claims, the proper statement of which further demonstrates Petitioners' standing to assert them.

### A. Petitioners State a Cognizable Injury Under the Equal Protection Clause as the Procedure Used to Enact Act 44 Denied and Continues to Deny Them "Full and Effective Participation."

Petitioners allege that the legislative procedure employed to enact Act 44 -- and in continuing instances since then – violates equal protection by creating a two-class legislature, in which some legislators are stripped of some of the irreducible minima of legislative membership and participation. Only some members are allowed to offer legislative language that can become law on major legislation such as Act 44,

while the majority are confined – like the lower-class Tribunes of ancient Rome – to voting only up or down and cannot offer even a single word in amendment.

This Court has declared that the Equal Protection Clause guarantees every citizen "an inalienable right to full and effective participation in the political processes of his State's legislative bodies," and that "the Constitution forbids 'sophisticated, as well as simple-minded, modes of discrimination.'" *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).[1] Thus, in the most directly relevant federal decision, the court found that one group of legislators may not exclude another from functions essential to the proper representation of constituents, even where the excluded legislator "was not barred from voting on the floor of the" legislative chamber. *Ammond v. McGahn*, 390 F.Supp. 655, 600 (D.N.J. 1975), *rev'd on other grounds*, 532 F.2d 325 (3rd Cir. 1976). *See also Gewertz v. Jackman*, 467 F.Supp. 1047, 1057, 1059 (D.N.J. 1997) (rejecting argument that exclusion from legislature must be complete to be actionable). Legislators do not have a right to unlimited debate or participation in every imaginable way – but they *do* and must have an equal right to

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[1] The Senate Respondents assert that the cases cited by Petitioners to demonstrate conflict in the circuits "involve voting rights" and thus somehow differ from "the types of claims raised by Petitioners in this case." Brief of Senate Respondents at 17. In fact, the cases cited by Petitioners, Petition for Certiorari 20-25, involve campaign contributions, racial discrimination, religious establishment, *as well as* voting rights. And the equal protection claim here *is* a "voting rights claim," the right to equal legislative representation deriving from the right to vote equally in state elections.

exercise the essential responsibilities of their office, including the right to propose legislative language and not solely to vote up-or-down on final passage. A large class of Pennsylvania legislators has been denied this minimum level of necessary participation on a systematic and on-going basis, and thus their constituents, including Petitioners, *see* Complaint ¶¶10-14, 18-25, 89, Third Cir. App. at 35-36, 37-40, 55, have been denied equal representation in the legislature. Petitioners therefore state a claim under the Equal Protection Clause that rests on an injury to their personal rights.

### B. Petitioners State a Cognizable Injury Under the First Amendment as the Respondents Took Active Steps to Preclude Petitioners from Exercising Their Right to Petition the State Government over Act 44.

Respondents incorrectly characterize Petitioners' Petition Clause claim as asserting a positive right to speech and input during legislative deliberations. Petitioners seek a much more circumscribed reading of the Petition Clause: that government officials may not take affirmative steps to preclude Petitioners from exercising their Petition Clause rights.

In this case, Respondents engineered and enforced an elaborate scheme whereby the public, and Petitioners specifically, would be wrongly informed that there was no pay-raise legislation until it was introduced and, within minutes, enacted in the early-morning hours of the July Fourth holiday – all to foreclose any dissenting speech until *after* it was law. But the right to petition *before the fact*, and not just to

complain afterward for "redress of grievances," has been recognized as part of the admittedly-limited core of this constitutional right. *See, e.g., Eastern R.R. Conf. v. Noerr Motor Freight*, 365 U.S. 127, 137-38 (1961) (Petition Clause protects "the ability of the people to make their wishes known to their representatives...with respect to the passage...of laws"); *Act-Up v. Walp*, 755 F.Supp. 1281, 1289 n.6 (M.D. Pa. 1981) (Pennsylvania legislature may not close its gallery so that citizens cannot witness its proceedings and "passively communicat[e] a citizen presence"); *Equality Found. of Cincinnati v. Cincinnati*, 860 F.Supp. 417, 445 (S.D. Ohio 1994) (citizens entitled to upfront input, though not "*successful* lobb[y]ing") (emphasis in original).

Petitioners' Petition Clause claim therefore presents the unsettled constitutional question of defining the minimum requirement of what this Court has called "among the most precious liberties safeguarded by the Bill of Rights." *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). Unless the Petition Clause has *no* meaning except prohibiting the naked proscription of speech – and this Court has indicated that it has *some* greater content than that – then, at minimum, it must prohibit the intentional foreclosure, as here, by government officials of any opportunity to petition against their actions beforehand. Petitioners therefore state a claim under the Petition Clause.

### C. Petitioners State a Cognizable Injury Under the Due Process Clause if Respondents Bartered or Improperly Discussed the Outcomes of Cases Involving Petitioners.

Petitioners' due process rights as litigants were violated by legislators secretly and repeatedly discussing with the justices numerous matters involving Petitioners coming before the state supreme court – including the serious possibility that the outcomes of these cases were pre-arranged as part of a "deal."[2] If so, Petitioners' due process rights have been violated, they have suffered particularized harm, and they have standing to advance those claims in federal court. *See Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997).

Respondents implicitly concede that Petitioners possess standing if they allege themselves to be victims of a fixed case. They argue at length, however, that such a potentially-tainted case involving Petitioners is either merely hypothetical or insufficiently pleaded.[3] In particular, Respondents argue that Petitioners must either have filed suit against Act 44 in state court or, at least, alleged that such a filing was "imminent" in order to state any cognizable injury *to themselves*.

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[2] Respondents inaccurately equate this with "the Chief Justice of the United States Supreme Court [speaking] publicly about federal judicial compensation." House Respondents' Brief at 21.

[3] Respondents also attempt to recast Petitioners' theory as arguing for "legislative due process," which it clearly does not – the due process claim concerns effects upon the *judicial* process.

Petitioners *actually* pleaded the following:

(1) For over a decade, several specific cases were allegedly the subject of inter-branch discussion and barter affecting their outcomes. These cases concerned the legislative conduct also challenged here. That conduct, court challenges to it, and alleged fixing of these challenges have occurred "consistently" over time, are "current and on-going," and became the "long-standing, accepted way of doing business." Second Amended Complaint at 4-6, Third Cir. App. at 25-27.

(2) These cases involved *these specific Petitioners* as litigants on a repeated and on-going basis. *See* Second Amended Complaint at 21-23, Third Cir. App. at 42-45, and reported cases cited in Petition for Certiorari 4, 8.

(3) The negotiations over Act 44, specifically, were part of this "continuing pattern." Second Amended Complaint at 4-7, 48-49 (Counts III-IV), Third Cir. App. at 25-28, 69-70.[4]

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[4] Petitioners also claim that the same discussions occurred regarding the gambling litigation *then pending in the state supreme court* and in which Petitioners Gregory Vitali and League of Women Voters were litigants. *See* Petition for Certiorari 8. Thus, even if Petitioners suffered no injury relative to the fixing of Act 44 litigation because they never ultimately sued over it in state court, these two Petitioners *did* suffer such an injury in the gambling litigation that was allegedly part of the Act 44 "deal."

In short, Petitioners clearly are not complaining only about "hypothetical" cases they never brought.[5]

Petitioners also clearly formulated an intention imminently to sue, once again, over these continuing violations: They have brought this very suit. They have demonstrated an intention of suing over this issue in state court: They have done so repeatedly, *supra*. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (standing to

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[5] Respondents also denounce these factual allegations, which is, of course, improper on a motion to dismiss. That these allegations and inferences are at least "plausible" is a matter of public record: Accusations of case-fixing are widespread in Pennsylvania, *see, e.g.*, Baer, "A Cynic Concocts Pa. Deep Throat: Tipster Sees Guv as a Fast Eddie," *Philadelphia Daily News* (June 13, 2005) (Governor Rendell "wants a judicial pay raise because the state Supreme Court is about to rule on whether his darling gambling law stands or falls"). Moreover, Petitioners appended to the complaint sworn affidavits from a state legislator and others, as well as internal email, providing eye-witness accounts substantiating these allegations. Third Cir. App. at 78-102. Petitioners have continued to proffer further substantiating evidence – including an eye-witness account of the then-Chief Justice reporting the availability of votes on his Court in exchange for a pay-raise. The opinion below and Respondents question whether such factual developments brought to the courts' attention post-Complaint can be noticed by the courts; in fact, such allegations, if consistent with the pleadings, demonstrate reasonable inferences that the Court *must* draw. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (federal court may not dismiss a complaint setting forth plausible claims which may be supported by any set of facts consistent with the complaint); *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 914-15 (7th Cir. 1985) (evidence discovered after Rule 12(b)(6) dismissal may be used to show that complaint should not have been dismissed on its face); *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 247 (3rd Cir. 1989).

challenge alleged harmful conduct where plaintiffs had used affected land *in the past*). Respondents argue, however, that Petitioners should have either brought *another* suit in state court and lost, or at least pleaded an imminent intention to bring another such state-court suit.

But Petitioners did *not* then have to file a futile, additional suit in state court – much less plead formulaically that they retained or still retain an imminent intent fruitlessly to do so – to have suffered or properly pleaded a cognizable injury.

- Such a suit did *not* need to be brought to perfect the claim: The due-process injury is, and occurs at the time of, the agreement to "fix" a case that Petitioners – demonstrably – intended to bring.

- Petitioners did not have to pursue a filing that would have been futile (as, indeed, it would be if Petitioners are correct and the case were already fixed). *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 944 n.2 (1982).

- Filing in state court would have necessitated abandoning Petitioners' right to federal review of Respondents' behavior (as Respondents themselves concede), which this Court does *not* require in order to establish standing. *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

*See* Petition for Certiorari 16-19.

Under Respondents' theory, however, Petitioners must always retain an imminent intention to sue in

state court: The instant they recognize the futility, i.e., that they've been injured by case-fixing and should seek federal jurisdiction, they lose both injury *and* federal jurisdiction. The instant they recognize that proceeding in state court would defeat federal jurisdiction, and decide not to proceed so as to preserve federal jurisdiction, they lose federal jurisdiction. Respondents' argument, in sum, is not law but sophistry.

Rather, the above-cited passages of the Complaint, combined with the statement of injury in Count III, ¶148, Third Cir. App. at 69, adequately pleaded (1) the facts constituting the violation *and* (2) the constitutional provision whose violation caused their injury. Petitioners thus claimed that the alleged case-fixing injured *them – as litigants –* in violation of *their* rights under the Due Process Clause. That is everything that is required of a Complaint. *See San Juan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994), *cited in Bell Atlantic*, *supra*, 550 U.S. at 563.

## III. RESPONDENTS' OTHER JUSTICIABILITY ARGUMENTS MISSTATE PETITIONERS' CLAIMS AND IGNORE THEIR ON-GOING INJURIES, BOTH CONSTITUTIONAL AND MONETARY.

Respondents launch what they call a "constellation" of justiciability arguments. It would be more accurate to call them a *cloud*, used simply to obscure the central issue in this Petition.

No-one is arguing that the federal courts ought to entertain state law claims in the absence of federal

jurisdiction. Legislators simply do not possess legislative immunity for fixing cases, bribing judges, or plotting to exclude the public from the legislative process. Nor does the state constitution's "speech and debate clause" apply here.

Respondents' argument that this case is moot and there is no further redress has been through several previous versions that have become moot themselves with changing events. Respondents now depend on misrepresentation.

Petitioners do not challenge the pay-raises *per se*: They challenge reportedly-negotiated case outcomes involving Petitioners, and the procedures used in passing the pay-raise bill and major legislation before and since. The constitutional violations resulting therefrom have not been remedied and – as Petitioners pleaded – are part of a long-term and still on-going pattern and practice in the Pennsylvania legislature that continues to violate Petitioners' constitutional rights. As to Respondents' contention that "Act 44 has been completely and entirely repealed by Act 30," Act 30 in fact has made the Act 44 judicial pay-raise *permanent*: Act 30 established that, henceforth, judicial salaries would be set at $1 above whatever they legally were on July 14, 2007; it did not merely "mention[]" Act 44, as Respondents contend, but made all future judicial salary levels contingent upon its validity *ab initio*. If Act 44 is, as Petitioners contend, void *ab initio*, then salary levels return under current law to pre-Act 44 levels. The question of Act 44's original validity thus still carries live financial implications for every judicial salary and pension. A decision in Petitioners' favor would effect both constitutional *and* monetary redress.

Finally, Respondents advance a truly novel theory under which the *Rooker-Feldman* doctrine would expand to bar all federal litigation that *could have been* brought in state court. As this Court has made clear, *Rooker-Feldman* applies only when the *same* claim is brought *first* in state court by the *same* party. *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994). Respondents concede that *none* of those conditions apply here. Instead, they argue that Petitioners cannot avoid *Rooker-Feldman* by *not* seeking a state court judgment – but that is *exactly* how to avoid *Rooker-Feldman*, and why federal jurisdiction is proper in all respects here.

The factual allegations in this case are serious and can only be redressed in federal court; Respondents essentially argue that *nothing* can be redressed in federal court. Petitioners possess standing, state valid federal claims, and plead particularized, cognizable injuries. This Petition raises an important constitutional question concerning application of the "generalized grievance" doctrine. It merits this Court's review.

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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